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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 855

WARREN G. WILLIAMS, JR.
Petitioner,

vs.

SEABOARD AIRLINE RAILROAD COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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SEABOARD AIRLINE RAILROAD COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Florida entered in this case on May 24, 1967.

CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at 199 So. 2d 469 and it is printed herein as Appendix A.

JURISDICTION

The decision of the Supreme Court of Florida was entered on May 24, 1967. A timely petition for rehearing was denied on June 28, 1967 (S.R. 21)[1]. Mr. Justice Black granted Petitioner's motion for an extension of time within which to file a Petition for Certiorari to and including November 25, 1967. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

I

Whether it is a violation of the Petitioner's right to due process and equal protection of the law as guaranteed by the Federal Constitution for the State Supreme Court to declare unconstitutional a validly enacted, judicially construed comparative negligence statute when such statute is clearly a reasonable exercise of police power of the state in the interest of the public safety.

II

Whether it is a violation of the Petitioner's right to due process and equal protection of law as guaranteed by the Federal Constitution for the State Supreme Court to pass upon a question which was not properly before the Court and so deprive the Petitioner of a vested right.

III

Whether it is a violation of the Petitioner's right to due process and equal protection of law as guaranteed by

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1. References to the record are cited as (R. .....). References to the Supplemental Record are cited as (S.R. .....).

the Federal Constitution for the State Supreme Court to give retrospective application to a recent decision declaring unconstitutional a state statute which had been previously construed to be valid and was in effect at the time the case was tried, the verdict entered and errors on appeal filed.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV: Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Article V, Section 4(2) of the Constitution of the State of Florida and Florida Statute, §768.06 (See Appendix B).

STATEMENT OF THE CASE

Warren G. Williams, the Petitioner, was seriously injured on July 29, 1963, when the motor vehicle which he was driving was smashed by a Seaboard Airline locomotive at one of the Seaboard Airline Company's railroad crossings in West Palm Beach, Palm Beach County, Florida. At the trial, both Mr. Williams and the Seaboard Airline Railroad requested the charge of comparative negligence under Florida Statute, §768.06 (R. 661, 696). At no time during the

trial did the Defendant railroad challenge the constitutionality or applicability of the comparative negligence statute. The jury returned a verdict in favor of the Petitioner (R. 714).

On October 26, 1964, the Seaboard Airline Railroad (hereinafter Seaboard) filed an appeal with the District Court of Appeal for the Second District. Seaboard raised some ten points in its Assignments of Error (R. 739-40). However, the railroad company still did not raise the constitutionality of the Florida comparative negligence statute. The case was fully briefed in the District Court of Appeals for the Second District. While the case was awaiting oral argument, on May 12, 1965, the Supreme Court of Florida, in *Georgia Southern & Florida Railway Company* v. *Seven-Up Bottling Co. of Southeast Georgia*, 175 So.2d 39 (See Appendix D herein), declared the comparative negligence statute of Florida unconstitutional.[2]

Seaboard, on May 20, 1965, filed a motion with District Court of Appeals for the Second District "To Amend Assignments of Error to Include the Constitutional Question and to File a Supplemental Brief" and a motion that "The Cause Be Remanded to the Trial Court for Retrial" (S.R. 1-4). The motions were briefed and argued, and on July 7, 1965, the Court of Appeals denied both motions. Seaboard took no further action and the case remained in that posture until November 7, 1965, when the case was transferred to the newly created District Court of Appeals for the Fourth District.[3]

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2. ". . . we hold that Section 768.06, *supra*, although perhaps valid when enacted, has now become a discriminatory and burdensome exercise of police power because of changed conditions; . . ." Id. at 42.

3. Article V, Section 5(2), Florida Constitution, as amended November 2, 1965. Ch. 65-294, Florida Statutes (1965), provided for the establishment of a new judicial district.

After arguments on the merits, the Court of Appeals, on July 26, 1966, entered a *per curiam* order affirming the decision of the trial court (S.R. 36). Seaboard's petition for rehearing was denied on September 8, 1966 (S.R. 16). Seaboard then petitioned the Supreme Court of Florida for a Writ of Certiorari. The writ was granted. In his brief the Petitioner pointed out that the issue of the constitutionality of the comparative negligence statute was not properly before the Court and that the application of the *Seven-Up* decision to the instant case would be a denial of his rights as guaranteed by the due process and equal protection clauses of the Federal Constitution. Nonetheless, the Supreme Court of Florida entered a *per curiam* order on May 24, 1967, reversing the Court of Appeals and applied retroactively the decision of the *Seven-Up* case. The Petitioner applied for rehearing and again asserted the violation of his federally protected rights. The Supreme Court of Florida denied his petition for rehearing on June 28, 1967 (S.R. 21).

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Florida raises an important and critical question for this Court's determination. Can a state supreme court in derogation of federally protected rights apply a recent constitutional interpretation to an already decided case thus depriving the Petitioner of a judgment in his favor which would compensate him for his injuries? In *Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537, 540 (1930), Mr. Justice Stone articulated the guiding precepts in this dark corner of the law. "Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of

the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."

The Supreme Court of Florida erroneously declared unconstitutional the Florida comparative negligence statute and further compounded the error by giving this interpretation retroactive effect. As will be pointed out in the arguments that follow the Supreme Court of Florida in usurping the legislative function has acted in a manner that results in a denial of constitutional rights. *Chicago Life Insurance Co.* v. *Cherry*, 244 U.S. 25 (1917).

In attempting to reach what it has declared to be uniformity and consistency in the administration of justice the Supreme Court of Florida has violated its own rules and the bounds of its own constitutional limitations. Such behavior is manifestly destructive of the basic considerations of fairness and justice which are the heart of due process.

I

Whether It Is a Violation of the Petitioner's Right to Due Process and Equal Protection of the Law Guaranteed by the Federal Constitution for the State Supreme Court to Declare Unconstitutional a Validly Enacted, Judicially Construed Statute, When Such Statute Is Clearly a Reasonable Exercise of Police Power in the Interest of the Public.

In May, 1965, the Supreme Court of Florida in *Georgia Southern and Florida Railway Company* v. *Seven-Up Bottling Company of Southeast Georgia, Inc.*; 175 So.2d 39, determined that the Florida Comparative Negligence Statute was unconstitutional. It is this decision and this action which the Petitioner directly challenges and calls upon this court to consider. The Court in declaring this

statute unconstitutional usurped the function of the legislature and struck down without affording interested parties the opportunity to come forward and present evidence and facts for the court's consideration.[4]

To appreciate fully the situation it must be pointed out that the *Seven-Up* case came to the court on a stipulated agreement of facts and involved only a question of damage to property. The personal injury side of the suit had been settled by the railroad and no real issue remained. Nonetheless, the court took the case and announced a proposition of far-reaching consequence and moment. It should also be pointed out that there was no Petition for a Writ of Certiorari filed with the Supreme Court of the United States.

The comparative negligence statute which was struck down has been on the books since 1887 and had been declared constitutional by the Supreme Court of Florida as recently as 1942 in *Loftin* v. *Crowley's, Inc.*, 8 So.2d 909. It should be noted that this Court denied a Petition for Writ of Certiorari in the case. The statute has since its passage conferred valuable rights in those situations where persons have been injured or killed in accidents involving railroad companies.

Indeed, the Florida Supreme Court in striking down the statute supplanted its will for that of the legislature.

> For reasons stated, we hold that Section 768.06, *supra*, although perhaps valid when enacted, has now become a discriminatory and burdensome exercise of police power because of changed conditions; and that it is,

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4. The Florida Supreme Court denied the petition of Academy of Florida Trial Lawyers, et al. for leave to appear as *amicus curiae* and for extension of time within which to file petition for rehearing and supporting brief.

therefore, invalid under the due process and equal protection clauses of the Federal Constitution and Section 12, Declaration of Rights, Florida Constitution. (Appendix D, p. A12).

Yet the opinion makes no mention of the many injuries and fatalities which still occur as a consequence of railroad accidents. The court did not discuss the many real and valid differences which exist between the railroad companies and other types of common carriers. It is difficult to imagine what radical changes have occurred since 1942 to cause the Supreme Court of Florida to now declare the statute unconstitutional—indeed no reason is given. Certainly the need for the legislation still exists.

Attached hereto as Exhibits D1-D6 are statistics obtained from the Florida Public Service Commission showing the still large number of accidents and type of injuries sustained in railroad accidents. It is hoped that if this petition is granted statistics can be offered to show the number of railroad accidents on a national scale to further highlight the magnitude of the problem.

Traditionally, railroads have been treated in a different manner than other common carriers.[5] Railroads benefited from grants of rights of way and unlike other common carriers own the property over which they travel and are correspondingly liable for its maintenance and repair. To do away with comparative negligence as a doctrine effectively demolishes the chances of recovery by the injured and removes the necessity for care and upkeep of warning devices, crossing signs, and suchlike.

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5. However, it should be noted that admiralty observes a comparative negligence type doctrine. See *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953). See also Jones Act, 46 U.S.C. §688 (injury to seaman).

It is well settled that reasonable classification is not violative of equal protection of law. A *legislature* may classify carriers and impose upon one burdens not borne by the others as long as the classification has a reasonable basis. *Morey* v. *Doud*, 354 U.S. 456 (1957). Indeed, almost every state has established some requirement applicable to one segment or class of business with little constitutional interference. See, for example, *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, reh. den'd 349 U.S. 925 (1955); *H. P. Welch Co.* v. *State of N. H.*, 306 U.S. 79 (1939). Motor carriers are subjected to different requirements than trains. Yet so long as that classification is reasonable the statute is not unconstitutional.

Even in the face of this compelling judicial development the Supreme Court of Florida in a *stipulated*[6] case chose to declare the state statute unreasonable and violative of equal protection.

Clearly, the action of the Florida court has consequences beyond its borders. Many states have adopted similar statutes and these statutes have been upheld as constitutional.[7] Yet, unless the action of the Supreme Court of Florida is here condemned, it may be the basis,

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6. It is interesting to note that the Plaintiff in that case did not file a petition for certiorari on this important question and when the Academy of Florida Trial Lawyers sought to file as amicus, the State Court denied its request.

7. Statutes making right to recover dependent on comparison of negligence.

Minn. — *Sharp* v. *Johnson*, 80 N.W.2d 650 (1957) (Nebraska Law).

Mich. — *Barnhart* v. *Pere Marquette Railroad Co.*, 155 N.W. 355 (1950).

Calif. — *Mantonya* v. *Bratlie*, 240 P.2d 667 (1952).

Ariz. — *Feffer* v. *Bowman*, 365 P.2d 472 (1961) (Arizona Employers' Liability Act).

the precedent, for actions in other states. Action of this type, which is so far-reaching in its consequences is more properly legislative in nature, the consequence of full hearing and the gathering of evidence from all interested parties.

This Court may appropriately take judicial notice of the fact that the federal government itself has enacted special legislation with regard to railroads and the liability of the employer. Federal Employers' Liability Act, 34 U.S.C., §45; Boiler Inspection Act, 45 U.S.C., §§22 *et seq.*; Safety Appliance Act, 45 U.S.C., §§1 *et seq.* Yet this legislation has not been deemed violative of the equal protection clause of the Federal Constitution.

Railroads in Particular

Mo. — *Tepel* v. *Thompson*, 220 S.W.2d 23 (1949) (Arkansas Law).

S.D. — *Johnson* v. *Chicago & Northwestern Railroad Co.*, 22 N.W.2d 725 (1946).

Wisc. — *Brunner* v. *Minneapolis St. Paul & S.M.R. Co.*, 139 F.Supp. 424, affirmed, 240 F.2d 608 (7th Cir. 1957).

Neb. — *Lewis* v. *Union Pacific Railroad Co.*, 226 N.W. 318 (1929).

Ark. — *Mo. Pacific Railroad Co.* v. *Binkley*, 188 S.W.2d 291 (1945).

Statutes diminishing amount of recovery in proportion to the amount of negligence attributable to plaintiff.

C.Z. — *Panama Railroad Co.* v. *Davies*, 82 F.2d 123 (5th Cir. 1936).

Miss. — *Whitescarver* v. *Miss. Power & Light Co.*, 5 F.Supp. 948, affirmed, 68 F.2d 928 (5th Cir. 1924).

Fla. — *Kirkland* v. *City of Gainesville*, 166 So. 460 (1936).

Ind. — *Louisville, etc.* v. *Wene*, 202 Fed. 887 (7th Cir. 1913).

S.C. — *Templeton* v. *Charleston, etc. Railroad Co.*, 108 S.E. 363 (1921).

Wyo. — *Hines* v. *Sweeney*, 201 Pac. 165 (1921).

Ill. — *Humphreys* v. *East St. Louis & Suburban Railway Co.*, 253 Ill. App. 450.

Ga. — *Southland Butane Gas Co.* v. *Blackwell*, 88 S.E.2d 6, conformed to 88 S.E.2d 424 (1955).

Tenn. — *Swift & Co.* v. *Phelps*, 273 F.2d 551 (6th Cir. 1960).

There can be no doubt that the action of the Supreme Court of Florida is far outside the usual judicial function and is therefore improper. Certainly what the Supreme Court of Florida has done is far beyond determining a question of local law, the action of the court involves the very right to recovery for injury and death which are the unhappy consequence of railroad accidents from which the legislature sought to protect the public. cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

The legislature in passing the Florida statute fully intended to protect the public from the harm of railroad accidents. In such a situation it has been held to be a proper basis for classification.[8]

II

Whether It Is a Violation of the Petitioner's Right to Due Process and Equal Protection of Law As Guaranteed by the Federal Constitution for the State Supreme Court to Pass upon a Question Which Was Not Properly Before the Court and So Deprive the Petitioner of a Vested Right.

Petitioner Warren G. Williams was struck and seriously injured by a Seaboard Airline locomotive on July 29, 1963. A complaint was filed against the railroad charging specific acts of negligence which resulted in the Petitioner's injury. In effect at the time of the accident and at the time of trial was Florida Statute §768.06 which provided that the victim of the accident could recover damages even when it was shown that the railroad and the victim were both at fault, except that the amount of recovery would be in proportion to the Defendant's negligence. This statute had been passed in the late 1880's

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8. See *Ex Parte Tigner*, 132 S.W.2d 885, aff'd *Tigner* v. *State of Texas*, 310 U.S. 141, *reh. den'd*, 310 U.S. 659 (1940).

and had been judicially construed and upheld in many cases since that time as a valid exercise of police power. The classification with reference to railroads was reasonable and the statute was not essentially arbitrary or unfair.[9]

Both parties to the action prosecuted the lawsuit in accord with the statute and both parties requested instructions in accord with the statute. At no time during the trial did Seaboard attack the constitutionality of the statute. When the jury in accord with the court's instruction and the prevailing statute returned a verdict in favor of the Petitioner the railroad noticed its appeal and filed with the Court of Appeals assignments of error. None of the assignments asserted or even intimated that the comparative negligence statute under which the lawsuit was tried was unconstitutional. However, after the issues were fully briefed and in the hands of the court, the Supreme Court of Florida announced that the comparative negligence statute, though valid when passed, was now invalid. Accordingly, the railroad made motion to the court to take advantage of the change in the law. On July 7, 1965, the Court of Appeals denied the motions and rightfully so.

> It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by this Court of Appeal. *Moriani* v. *Schleman*, 94 So.2d 839 (S.Ct. of Florida 1957). See also *Gleason* v. *Dade County*, 174 So.2d 466 (1965).

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9. See, E.g., *Loftin* v. *Crowley's, Inc.*, 8 So.2d 909 (1942). It should be noted that the Supreme Court of the United States denied a petitoin for writ of certiorari, 317 U.S. 661, in this case.

The District Court of Appeals acted in accordance with the law as it had been determined by prior decision. *State* v. *McInnes,* 133 So.2d 581 (1961). Seaboard filed no petition for rehearing to the Court of Appeals, nor certiorari to the Supreme Court of Florida. In November, 1965, the case was transferred to the newly created Court of Appeals for the Fourth District for the determination of the merits of the appeal.

Clearly, the order of the Second District refusing to reopen the case with regard to a matter not raised at trial was a final order.[10] Pursuant to Article V, Section 4(2) the Defendant was obliged to take the matter to the Supreme Court within 60 days as provided by Rule 4.5(c) of Florida Appellate Rules.

The requirement that an application for certiorari filed within 60 days from rendition is jurisdictional and when more than 60 days has elapsed the petition will be dismissed. *Hayes* v. *State,* 151 So.2d 671 (1963), *Flinchbaugh* v. *Florida Real Estate Commission,* 148 So.2d 235 (1963), *Igleheart* v. *City of Miami Beach,* 97 So.2d 487 (1957). This Court is, of course, familiar with the rule in as much as it operates under the same procedure. See Rule 22, Revised Rules of the Supreme Court of the United States.

The record as it was transferred to the Fourth District was complete. The only matters left to be decided were the issues raised by the assignment of errors. The Defendant again tried to raise the constitutional issue by a petition for rehearing. The court, after oral argument,

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10. *Tyler* v. *Huggins,* 175 So.2d 239 (1965). "The finality of the order depends upon the party aggrieved; that is, whether the order appealed from finally determined the particular question as to such party."

on July 26, 1966, affirmed *per curiam* the decision of the trial court.

The action of the Supreme Court of Florida in permitting the Defendant in its petition for writ of certiorari and brief to raise the issue of the constitutionality of the comparative negligence statute was such as to violate the fundamental concepts of due process. See *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). There was no substantial or fair reason to do so. The record on its face contained no error and no conflict with prior or contemporaneous decisions of the Court. *Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537 (1930). At the time the appellate court issued its order the Petitioner had a vested interest in the verdict; he had acquired a property right which could not be taken from him in a fashion violative of due process. Certainly no legislature could have acted so arbitrarily. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, 258 U.S. 338 (1922).

It should be observed that when the Petitioner obtained a *per curiam* affirmance from the Fourth District Court of Appeals it was a final judgment. The Florida statute does not provide for appeal as a matter of right. Review could only be obtained by petition for certiorari in accordance with specific requirements. There was nothing in the record which would support such a writ. Yet the court in derogation of its own rules and the weight of decided cases granted the petition.

As will be developed in the succeeding argument the action of the court in giving retroactive application to the decision in *Seven-Up* also violated the protections afforded by the due process clause of the Federal Constitution.

III

Whether It Is a Violation of the Petitioner's Right to Due Process and Equal Protection of Law As Guaranteed by the Federal Constitution for the State Supreme Court to Give Retrospective Application to a Recent Decision Declaring Unconstitutional a State Statute Which Had Been Previously Construed to Be Valid and Was in Effect at the Time the Case Was Tried, the Verdict Entered and Errors on Appeal Filed.

The Supreme Court of Florida in granting Respondent's writ of certiorari erroneously applied in retrospect to the case at bar, *Georgia Southern and Florida Railway Co.* v. *Seven-Up Bottling Company of Southeast Georgia, Inc.*, 175 So.2d 39 (1965), holding F.S. §768.06 unconstitutional, a decision rendered long after the determination of Petitioner's case in the trial court, and the Respondents' assignment of errors on appeal.

Clearly, the Supreme Court of Florida erred in applying retrospectively a decision invalidating F.S. §768.06. The question of the validity of the statute was never properly raised and did not form part of the record of the lower courts. Even assuming *arguendo* that the question was properly part of the record below, such question was jurisdictionally barred because the necessary petition to the Supreme Court of Florida was not filed within 60 days after the order of the Second District Court of Appeals.

The United States Supreme Court in an unbroken line of cases starting with the *United States* v. *Schooner Peggy*, 5 U.S. 103, 1 Cranch. 103 (1801), to the latest case, *Linkletter* v. *Walker*, 381 U.S. 618 (1965),[11] has recognized the

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11. See particularly 381 U.S. 625, 628. Justice Clark's opinion recognizes a state "may make a choice for itself between the

principle that when a judgment has been finalized, and is not on direct review, any subsequent court decisions should not be given retroactive effect to this particular class of cases. Chief Justice Hughes in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), commenting on applying retroactively a subsequent ruling by a court invalidating a statute said:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to the invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

The particular circumstances of the instant case are exigencies which demand examination to afford Petitioner his right to due process and equal protection of the law. The longstanding Florida railroad comparative negligence statute, §768.06 had been deemed valid by the State Supreme Court, *Loftin* v. *Crowley's, Inc., supra,*[12] a factor lending to, if not compelling the parties' unquestioning belief in the constitutionality of the statute. The injustice of applying the *Seven-Up* decision retrospectively is clearly ap-

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principle of forward operation and that of relation back." However, the Court recognizes that it "may *in the interest of justice* make the rule prospective," and that in particular cases, "there is much to be said in favor of such a rule for cases arising in the future."

12. See also *Seaboard A.L.R. Co.* v. *Watson*, 287 U.S. 87 (1932); *Missouri Pacific R. Co.* v. *Ozro Castle*, 224 U.S. 541 (1912); *De Soto Motor Corp.* v. *Stewart*, 62 F.2d 914 (10th Cir. 1933).

parent in the circumstances of the Petitioner's case where a statute has long been in effect, with substantial judicial support for its validity, and where both parties have relied on its application through the course of the original trial and the most substantial part of a long pending appeal. Years of effort and the expense of litigation are wasted.

It is an unreasonable burden, and offensive to the concept of fundamental fairness to require one to bear the effort and expense of litigation for a second time. Even to those who could bear the additional time, effort and expense the second hearing is a penalty. To those less fortunate who cannot bear the additional effort and expense the opportunity for a second hearing results in no hearing at all.[13] Retrospective application creates grave uncertainties and doubts about the administration of justice, and would cause even the most venturesome litigant to question the efficacy of a lawsuit knowing it was subject to unforeseen vicissitudes in the law. Indeed, if retroactive effect were generally applied, the stability of the law, and our fundamental relationships to property and persons premised upon such law would be greatly undermined.

Past decisions have recognized the injustice and unfairness of retrospective application of the law in the area of contract and vested property rights,[14] decisions founded

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13. Where in reliance upon the comparative negligence statute, the Petitioner stipulated to facts prejudicial to recovery on a contributory negligence standard, the retroactive application of a decision invalidating the Florida statute deprived Petitioner of a hearing, in depriving "a person [Petitioner] of all remedy", and where there was not "afforded to him some real opportunity to protect it [i.e. his right to a hearing]" *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

14. *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decision*, 60 Harvard L.Rev. 437.

on the rationale of reliance on the then existent law in entering into the contract or property relationship. Even greater reliance is apparent in litigation where argument is founded upon the law then existing, particularly where there has been previous judicial interpretation supporting the statute or provision relied upon.[15]

Under the particular circumstances Petitioner believes justice and fairness would abhor retrospective application of the *Seven-Up* decision, where there was long and rigorous reliance in litigation upon the previous well established and unchallenged railroad comparative negligence statute. The ease of prospective application, the paucity of pending litigation under the comparative negligence statute, the great burden in terms of expense and effort placed upon litigants to retry the case in relation to the insignificant burden on the part of the railroads to complete litigation of these pending cases upon the comparative negligence statute, and the lack of any indication in the *Seven-Up* opinion that the decision should be retroactively applied by the District Court of Appeal are all facts compelling the determination that the Petitioner was denied his right to due process and equal protection of the laws guaranteed by the Fourteenth Amendment.[16]

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15. *Tilly* v. *Flippin*, 237 F.2d 364 (10th Cir. 1956); *De Soto Motor Corp.* v. *Stewart, supra.*

16. Many cases have recognized the injustice of retroactive application. See, for example, *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144 (1944); *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 68 U.S. 175 (1864); *Molitor* v. *Kaneland Comm. Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Harman* v. *Auditor of Public Accounts*, 123 Ill. 122, 13 N.E. 161 (1887); *People ex rel. Att. General* v. *Solomon*, 54 Ill. 39 (1870); *State* v. *Jones*, 44 N.M. 623, 107 P.2d 324 (1940); *Continental Supply Co.* v. *Abell*, 95 Mont. 148, 24 P.2d 133 (1933); *Hare* v. *General Can Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952).

CONCLUSION

For all reasons stated herein Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

PEYTON FORD

JOSEPH D. FARISH, JR.

Of Counsel:

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APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967

SEABOARD AIR LINE RAILROAD COMPANY, a foreign corporation, authorized to do business in the State of Florida,
Petitioner,
vs.
WARREN G. WILLIAMS, JR.,
Respondent.

Case No. 35,718

Opinion filed May 24, 1967

Writ of Certiorari to the District Court of Appeal, Fourth District

Manley P. Caldwell of Caldwell, Pacetti & Barrow and Chas. S. Ausley of Ausley, Ausley, McMullen, O'Bryan, Michaels & McGehee, for Petitioner

Farish & Farish and Jos. D. Farish, Jr., for Respondent

PER CURIAM.

On July 29, 1963 respondent Williams was injured in an accident involving one of petitioner's trains. After trial in which the jury was charged on the doctrine of comparative negligence judgment in sum of $141,750.00 was entered for respondent on July 3, 1964. Petitioner appealed to the District Court of Appeal, Second District.

While that appeal was pending this court on May 12, 1965 entered its decision in *Georgia Southern and Florida Railway Company* v. *Seven-Up Bottling Company of Southeast Georgia, Inc.*, Fla. 1965, 175 So. 2d 39. In that case Section 768.06, F.S., the railroad "comparative negligence" statute, was held unconstitutional.

Immediately following the filing of our decision in the *Georgia Southern* case petitioner moved the district court for leave to amend its assignment of errors to include an assignment asserting the unconstitutionality of Section 768.06 and also moved the court to remand the cause for new trial, basing its motions on the decision in the *Georgia Southern* case. These motions were denied and following creation of the District Court of Appeal, Fourth District, the cause was transferred to that court. The latter court subsequently entered its decision "Per Curiam. Affirmed." In a petition for rehearing the petitioner railroad again called to the attention of the district court our opinion in the *Georgia Southern* case and informed that court of the pendency in this court on petition for certiorari of two cases involving the same question. *Florida East Coast Railway Company* v. *Rouse*, Fla. App. 1965, 178 So. 2d 882, and *Atlantic Coast Line Railroad Company, et al.* v. *Braz*, Fla. App. 1966, 182 So. 2d 491. The petition for rehearing was denied and petitioner railroad filed its petition for certiorari in this court.

On January 9, 1967, prior to our hearing argument in this cause, we filed our opinions in *Florida East Coast Railway Company* v. *Rouse*, Fla. 1967, 194 So. 2d 260, and *Atlantic Coast Line Railway Company, et al.*, v. *Braz*, 196 So. 2d 109. In each of those cases the petitioner railroads did not attack the validity of Section 768.06 at the trial but raised the issue for the first time on appeal in the district

court. Holding that an appellate court is required to apply the law as it existed at the time of the appeal this court reversed and remanded both causes for new trial under the law as settled in the *Georgia Southern* case.

Under our decision in *Foley* v. *Weaver*, Fla. 1964, 177 So. 2d 221 we are permitted to examine the record proper to determine if conflict in decisions exists. The situation presented by this case demonstrates the necessity for and wisdom of the rule in Foley.

In this cause, as in *Rouse* and *Braz*, the trial judge charged the jury on comparative negligence pursuant to Section 768.06. In neither cause was the validity of the statute or the correctness of the charges thereon raised until the judgments were in the district courts on appeal. In each cause the district courts affirmed the judgments despite the fact that we had in the *Georgia Southern* case held the subject statute invalid and remanded that cause for new trial because the jury was charged thereunder. In each the Rouse and Braz cases we remanded for new trials free of charges under the invalid statute.

If the per curiam decision in this cause is permitted to stand the result will be, and it is obvious for all to see, that the rule of law applicable at the time of appellate decision will have been applied in the two cases while a different erroneous rule will have been applied in the third. Another consequence, equally repugnant to the even handed administration of justice, is that because of an unforeseeable but later determined error the defendants in two causes will be given new trials yet the defendant in the third will not. Consistency and uniformity in the administration of justice ought to exist to the point that this result not be sanctioned.

For these reasons the decision of the district court is quashed with directions that the cause be remanded to the trial court for a new trial.

It is so ordered.

ROBERTS, O'CONNELL and CALDWELL, JJ., concur

DREW, J., concurs specially with Opinion

THORNAL, C.J., THOMAS and ERVIN, JJ., dissent

DREW, J., concurring specially:

I did not agree with the majority in Florida East Coast Railway Company v. Rouse, Fla. 1967, 194 So. 2d 260, and in Atlantic Coast Line Railway Company, et al., v. Braz, 196 So. 2d 109, on the identical issue which is involved in this case. My views are fully set forth in my dissenting opinion in each of those cases. Further discussion here would serve no useful purpose. Both cases received minute consideration and long deliberation before the ultimate judgment was reached and although I dissented, I consider the law there announced to be binding upon me as a Justice of this Court in the disposition of this case. Uniformity of decisions in our jurisdiction and the basic concept of equal justice under law simply require the result reached in the majority opinion. Any other conclusion would produce a judicial absurdity.

In my concurring opinion in Foley v. Weaver Drugs, Fla. 1965, 177 So. 2d 221, I observed: "I think it would result in utter chaos in the judicial system of this State with three separate District Courts, and the possibility of a fourth in the near future, if it were impossible for this Court to maintain consistency and uniformity of the law in [decisions of such district courts merely affirming without opinion]. . . ." What has occurred in this case

fulfills that prophecy. I, therefore, concur in the foregoing majority opinion.

O'CONNELL, J., concurs

APPENDIX B

Statutes Involved

I. Railroad Comparative Negligence Statute, Section 768.06, Florida Statutes, F.S.A.

"No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."

II. Time Limit for Petition for Writ of Certiorari—Florida Appellate Rules, Rule 4.5c

"Application for writ of certiorari shall be by petition filed in the Court within 60 days from the rendition of the decision, order, judgment or decree sought to be received."

III. Article V, Section 4(2), Constitution of State of Florida.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or a treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that

passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same points of law; and may issue writs of certiorari to commissions established by law.

APPENDIX C

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1965

GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY, a corporation, Appellant, vs. SEVEN-UP BOTTLING COMPANY OF SOUTHEAST GEORGIA, INC., a corporation, Appellee.	Case No. 33,343

Opinion filed May 12, 1965

An Appeal from the Circuit Court for Duval County, Marion W. Gooding, Judge

Mathews, Osborne & Ehrlich, for Appellant

Howell, Kirby, Montgomery and Sands, for Appellee

Charles A. Ausley of Ausley, Ausley, McMullen, O'Bryan, Michaels & McGehee, for Amicus Curiae

ROBERTS, J.

This is a direct appeal from a judgment which, inter alia, passed directly upon the validity of Section 768.06,

Florida Statutes, and held that it was immune to the attacks made thereon by the appellant.

The statute in question, sometimes known as the "comparative negligence" statute, provides that

> "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."

The appellant railroad company concedes that, at the time of the statute's enactment in 1887, the Legislature, in the exercise of its police power and in the interest of public safety, could validly deal with what, at that time, "was the only commonly dangerous instrumentality operated in the state." It contends, however, that times have changed; and that a statute which is valid when enacted may become invalid by changes in the conditions to which it applies. This is unquestionably the law. See Atlantic Coast Line R. Co. v. Ivey, Fla. 1942, 5 So. 2d 244; Caldwell v. Mann, Fla. 1946, 26 So. 2d 788. And if the doctrine of "comparative negligence" as incorporated in the statute were being introduced at this late date as a brand-new concept of what the railroads' liability should be in this type of case, we have no doubt that the instinctive reaction of all persons—laymen and lawyers alike—to such a singling out of railroads for the imposition of such a burden would be one of surprise, shock, and a feeling that the Legislature had violated the rules of fair play. More importantly, we have the view that the public opinion thus hypothesized would be in accord with the organic

requirements of "fair play" as preserved for us in the due process and equal protection clauses of the federal and Florida constitutions.

The purpose of the equal protection clause has been many times stated by this court, but never more simply or clearly than in Davis v. Florida Power Company, 1913, 64 Fla. 246, 60 So. 759, as follows:

> "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person, or class of persons, from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation."

And, as stated in Seaboard Air Line Ry. v. Simon, 1908, 56 Fla. 545, 47 So. 1001:

> "Like all other statutes imposing regulations, such laws should be based upon a just classification of persons and corporations *with reference to the subject regulated,* and such classification should not be purely arbitrary." (Emphasis added.)

The "subject regulated" by the statute in question is the liability of a railroad for damage done to persons and property by the running of its trains. The primary purpose of the regulation appears to be "to enforce a high degree of efficiency and care and to avoid negligence in rendering the public service involving the safety of persons and property . . .", quoting from the concurring opinion of Justice Whitfield in Loftin v. Crowley's, Inc., 1942, 150 Fla. 836, 8 So. 2d 909. Again, in Grace v. Geneva Lumber Co., this court said:

> "The statutory liability of railroad companies for damage done to persons and property by the running of the trains of such companies is predicated upon a classification having a substantial basis in the dangers incident to the operation of railroad trains; * * *"

See also Brahan v. Meridian Light & Ry. Co., Miss. 1919, 83 So. 467, in which the Mississippi Supreme Court was concerned with a "comparative negligence" statute of Mississippi applicable to all actions for personal injuries, and in which it was said:

> "The evident purpose of this statute was to impose liability on persons whose negligence caused an injury to a person, even though such person might also be guilty of negligence, for the purpose of compelling a high degree of care so as to protect life and limb, * * *".

The statute in question was enacted some ten years before the first patent was issued in this country for a gasoline-driven automobile. By 1906 there were only 296 cars in the entire state of Florida, Cash, *The Story of Florida*, Vol. 2, p. 537, and in 1912 only 25.4 miles of brick highway in the state. (See Archives of Florida State Highway Department.) By 1920, however, the dangerous character of a motor vehicle had become sufficiently known to persuade the court to apply to this "new instrumentality imminently dangerous to the persons using the public highways" the common-law rule respecting the liability of a master who entrusts a dangerous instrumentality to a servant. See Southern Cotton Oil Co. v. Anderson, 1920, 80 Fla. 725, 86 So. 629. The court said:

> "If a locomotive engine and a handcar are peculiarly dangerous when operated on a railroad track, certainly a motor car is peculiarly dangerous when operated on public highways."

Any doubt that this holding was to be limited to cases involving a master-and-servant relationship was dissipated by the decisions in Herr v. Butler, 1931, 101 Fla. 1170, 132 So. 815, and Crenshaw Bros. Produce Co. v. Harper, Fla. 1940, 194 So. 353. In the case last cited, the court said:

> "In the light of our own former decisions, holding the motor vehicle to be a highly dangerous agency while in operation, it is but reasonable that we should attach thereto the law applicable to dangerous agencies, including the principle, applied to this particular case, that the driver of such dangerous agency, in this case a motor truck, is the vice-principal of his master, the owner, and that therefore in cases of this kind the fellow servant doctrine cannot be invoked as a defense."

As stated in Atlantic Coast Line Railroad Co. v. Ivey, supra, 5 So.2d 244, in holding unconstitutional the statute (enacted in 1899) authorizing the recovery of double the value of livestock killed on an unfenced railroad company right-of-way,

> "It cannot be questioned that those transportation companies engaged as common carriers on the public roads and those so engaged on their privately owned roads such as railroad companies, owe like duties to the public and are under like obligations for the protection against accidents to life and property in conducting such business."

It would seem, therefore, that any regulation designed to compel a high degree of care on the part of those persons or corporations who render a public service involving the safety of persons and property should bear with equal force upon all such persons or corporations. In the early days of railroading, it may be that the company could absorb into its rate structure the financial burden imposed by the statute in question and pass it on to its customers; but under the present competitive conditions existing between rail and motor transports, such an unrealistic approach is untenable. And even if it were possible to do so, it would seem to be basically unfair to railroad customers to compel them to bear such a burden and, at the same time, leave free from such burden the large number

of customers who avail themselves of motor and other competitive forms of transportation.

We have not overlooked the decision of this court in Loftin v. Crowley's, Inc., supra, 8 So. 2d 909. There, in declining to strike down the statute in question, this court relied on decisions upholding statutes regulating railroads in various respects, none of which involved the regulation with which we are here concerned; and in attempting to distinguish its decision, recently rendered, in Atlantic Coast Line R. Co. v. Ivey, supra, 5 So. 2d 244, the court said that

> "In that case we were dealing with a statute which imposed penalties on one class of common carrier which were not imposed on another class performing the same service in the same localities. * * *".

It may be that, twenty-three years ago when Loftin v. Crowley's was decided, the imposition of "comparative negligence" liability upon the railroads by the statute in question was not so unduly burdensome as to amount to a penalty; but today the situation is not the same, as the facts of the case *sub judice* demonstrate.

Here, a collision occurred between a train owned by the appellant railroad company and a truck owned by the appellee, a bottling company. As a result of the collision, the railroad company sustained damages of $3,000.00 and the damages of the bottling company were $3,250.00. Based on evidence from which the jury could find that each party was fifty percent at fault and under appropriate instructions from the judge, the jury returned a verdict denying the railroad's claim and awarding to the bottling company fifty percent of its claimed damages. Thus, under the impact of Section 768.06, the railroad company was compelled to stand its entire loss ($3,000.00) and, in addition, pay to the bottling company fifty percent of its dam-

ages ($1,625.00). To thus penalize the railroad company seems to us to be wholly arbitrary and contrary to the principles of law respecting the constitutional right of equal protection. Paraphrasing the language of this court in Seaboard Air Line Ry. v. Simon, supra, 47 So. 1001, 1005:

> "The regulation does not cover a subject in which the duties of those who operate railroads legally differ from other common carriers . . ., and there appears to be no natural, practical, and substantial difference between railroads and other common carriers . . . with reference to the duty [to exercise a high degree of care in the operation of a dangerous instrumentality, whether it be a train or a motor vehicle common carrier.]"

For the reasons stated, we hold that Section 768.06, supra, although perhaps valid when enacted, has now become a discriminatory and burdensome exercise of the police power because of changed conditions; and that it is, therefore, invalid under the due process and equal protection clauses of the federal constitution and Section 12, Declaration of Rights, Florida Constitution.

Accordingly, the judgment appealed from is reversed and the cause remanded for further proceedings.

It is so ordered.

DREW, C.J., THOMAS, THORNAL, O'CONNELL and CALDWELL, JJ., concur

ERVIN, J., concurs specially with opinion

ERVIN, J., specially concurring.

I am in thorough agreement with the foregoing opinion and judgment. It denotes that this Court has adopted a realistically modern concept of the doctrine of equal protection, which concept as an overall precedent of this Court should go far to preclude discrimination in many areas of activity in our state.

SUMMARY OF RAILROAD ACCIDENTS FOR CALENDAR YEAR 1962
STATE OF FLORIDA
GRADE CROSSING ACCIDENTS

	Protected By	Number People I	Number People K	Type of Accident: Veh. Hit Train Day	Veh. Hit Train Night	Train Hit Veh. Day	Train Hit Veh. Night	Total No. Vehicles Involved	Total Accidents	Total I	Total K
Railroad A:	(Cross (X) Buck Signs	37	12	5	3	29	4	41			
	Automatic Signals	9	5	6	1	3	1	13	54	46	17
Railroad B:	(Cross (X) Buck Signs	14	9	2	5	6	5	18			
	Automatic Signals	7	0	4	0	3	0	7	25	21	9
Railroad C:	(Cross (X) Buck Signs	2	0	1	0	1	0	2			
	Automatic Signals	3	0	0	0	1	0	1	3	5	0
Railroad D:	(Cross (X) Buck Signs	2	0	0	1	0	0	1			
	Automatic Signals	0	0	0	0	0	0	0	1	2	0
Railroad E:	(Cross (X) Buck Signs	3	0	1	0	1	0	2			
	Automatic Signals	0	0	0	0	0	0	0	2	3	0
Railroad F:	(Cross (X) Buck Signs	24	23	9	3	22	4	38			
	Automatic Signals	32	14	2	4	6	2	14	52	56	37
Railroad G:	(Cross (X) Buck Signs	0	0	0	0	0	0	0			
	Automatic Signals	0	1	0	1	0	0	1	1	0	1
TOTAL		133	64	30	18	72	16	*138	*138	133	64

Number vehicles hit train at night on cross (X) buck sign crossing	11
Number vehicles train hit at night on cross (X) buck sign crossing	13
Number vehicles hit train daytime on cross (X) buck sign crossing	17
Number vehicles train hit daytime on cross (X) buck sign crossing	59
Number vehicles hit train at night on automatic signal crossing	9
Number vehicles train hit at night on automatic signal crossing	4
Number vehicles hit train daytime on automatic signal crossing	10
Number vehicles train hit daytime on automatic signal crossing	15
Grand Total all Railroad Companies	*138

"I" Designates those injured
"K" Designates those killed

OTHER ACCIDENTS

	Employees I	Employees K	Passengers I	Passengers K	Trespassers I	Trespassers K	Non-Trespassers I	Non-Trespassers K	Derailments	Collisions	Railroad Property Loss	Employees Time Loss	Total Accidents	Total I	Total K	Total All Accidents I	Total All Accidents K	Grand Total Accidents
Railroad A:	89	2	16	0	4	5	7	0	13	3	70,700.59	1997 Days	130	116	7	162	24	186
Railroad B:	104	1	55	0	3	5	6	0	0	2	14,618.00	2713 Days	137	168	6	189	15	162
Railroad C:	3	0	0	0	0	0	0	0	0	0	3,300.00	90 Days	3	3	0	8	0	6
Railroad D:	3	0	0	0	0	1	0	0	4	0	13,709.70	29 Days	8	3	1	5	1	9
Railroad E:	4	0	0	0	0	0	0	0	0	0	.00	219 Days	3	4	0	7	0	5
Railroad F:	125	2	15	0	2	13	5	0	5	4	543,847.00	2821 Days	158	147	15	203	52	210
Railroad G:	0	0	0	0	0	0	0	0	0	0	.00	0 Days	0	0	0	0	1	1
TOTAL	328	5	86	0	9	24	18	0	22	9	$646,175.29	7869 Days	439	441	29	574	93	577

SUMMARY OF RAILROAD ACCIDENTS FOR Year 1963
STATE OF FLORIDA

GRADE CROSSING ACCIDENTS

		Number People I	Number People K	Type of Accident: Veh. Hit Train Day	Veh. Hit Train Night	Train Hit Veh. Day	Train Hit Veh. Night	Total No. Vehicles Involved	Total Accidents	Total I	Total K
Railroad A:	Cross (X) Buck Signs	36	24	10	6	20	4	40	39	45	25
	Automatic Signals	7	1	0	3	3	3	9			
Railroad B:	Cross (X) Buck Signs	7	3	1	0	2	1	4	13	10	4
	Automatic Signals	3	1	0	0	8	1	9			
Railroad C:	Cross (X) Buck Signs	36	17	7	9	14	9	39	60	59	23
	Automatic Signals	23	6	6	5	10	0	21			
Railroad D:	Cross (X) Buck Signs	1	1	0	0	1	1	2	2	1	1
	Automatic Signals	0	0	0	0	0	0	0			
Railroad E:	Cross (X) Buck Signs	0	3	0	0	1	0	1	1	0	3
	Automatic Signals	0	0	0	0	0	0	0			
TOTAL		113	56	24	23	59	19	*125	*125	113	56

Number vehicles hit train at night on Cross (X) Buck Sign Crossing	16
Number vehicles train hit at night on Cross (X) Buck Sign Crossing	14
Number vehicles hit train day time on Cross (X) Buck Sign Crossing	19
Number vehicles train hit day time on Cross (X) Buck Sign Crossing	37
Number vehicles hit train at night on Automatic Signal Crossing	8
Number vehicles train hit at night on Automatic Signal Crossing	4
Number vehicles hit train day time on Automatic Signal Crossing	9
Number vehicles train hit day time on Automatic Signal Crossing	18
Grand Total all Railroad Companies.	*125

"I" Designates Injured
"K" Designates Killed

OTHER ACCIDENTS

	Employees I	Employees K	Passengers I	Passengers K	Tres-Passers I	Tres-Passers K	Non-Tres-Passers I	Non-Tres-Passers K	Derailments	Collisions	Railroad Prop. loss	Employees Time loss	Total Accid.	Total I	Total K	Total All Accidents I	Total All Accidents K	Grand Total Accidents
Railroad A:	68	0	1	0	6	3	8	1	13	1	$9,762.00	331 Days	130	113	4	155	5	160
Railroad B:	58	0	1	0	3	0	2	0	11	1	$2,003.00	1050 "	124	60	0	70	0	70
Railroad C:	178	3	13	0	7	3	17	0	8	2	$9,600.00	2830 "	100	73	6	83	9	92
Railroad D:	4	0	0	0	0	0	0	0	70	0	$1,000.00	34 "	5	4	0	5	0	5
Railroad E:	0	0	1	0	1	0	0	0	1	0	$1,000.00	.....	2	2	0	2	0	2
TOTAL	309	3	16	1	11	6	27	1	33	4	$19,711.23	6205 "	341	313	10	355	14	369

APPENDIX D-2

SUMMARY OF RAILROAD ACCIDENTS FOR CALENDAR YEAR 1964
STATE OF FLORIDA

GRADE CROSSING ACCIDENTS

		Number People I	Number People K	Type of Accident: Veh. Hit Train Day	Veh. Hit Train Night	Train Hit Veh. Day	Train Hit Veh. Night	Total No. Vehicles Involved	Total Accidents	Total I	Total K
Railroad A:	(Cross (X) Buck Signs	32	8	7	5	16	6	34			
	(Automatic Signals	8	2	0	0	3	4	7	41	40	10
Railroad B:	(Cross (X) Buck Signs	16	4	1	1	8	3	13			
	(Automatic Signals	5	2	1	0	2	1	4	17	21	6
Railroad C:	(Cross (X) Buck Signs	34	19	5	8	19	5	37			
	(Automatic Signals	15	8	3	4	6	4	17	54	49	27
Railroad D:	(Cross (X) Buck Signs	6	0	0	2	4	0	6			
	(Automatic Signals	5	6	1	1	1	2	5	11	11	6
Railroad E:	(Cross (X) Buck Signs	1	0	0	0	1	0	1			
	(Automatic Signals	2	0	0	1	1	0	2	3	3	0
TOTAL		124	49	18	22	61	25	*126	*126	124	49

Number vehicles hit train at night on Cross (X) Buck Sign Crossing ---------- 16
Number vehicles train hit at night on Cross (X) Buck Sign Crossing ---------- 14
Number vehicles hit train day time on Cross (X) Buck Sign Crossing ---------- 13
Number vehicles train hit day time on Cross (X) Buck Sign Crossing ---------- 48
Number vehicles hit train at night on Automatic Signal Crossing ---------- 6
Number vehicles train hit at night on Automatic Signal Crossing ---------- 11
Number vehicles hit train day time on Automatic Signal Crossing ---------- 4
Number vehicles train hit day time on Automatic Signal Crossing ---------- 13
Grand Total all Railroad Companies ---------- * 126

OTHER ACCIDENTS

	Employees I	Employees K	Passengers I	Passengers K	Trespassers I	Trespassers K	Non-Trespassers I	Non-Trespassers K	Derailments	Collisions	Railroad Prop. Loss	Employees Time Loss	Total Accid.	Total I	Total K	Total all Accidents I	Total all Accidents K	Grand Total Accidents
Railroad A:	130	1	9	0	9	3	6	1	9	5	$ 90,778.43	3002	173	154	5	194	15	214
Railroad B:	64	0	0	0	3	0	0	0	12	1	783,120.00	1094	80	67	0	88	6	97
Railroad C:	122	1	5	0	3	4	11	0	7	1	279,897.00	2267	154	141	5	190	32	208
Railroad D:	5	1	0	0	0	0	0	0	0	0	-0-	87	6	5	1	16	7	17
Railroad E:	2	0	0	0	0	0	0	0	1	0	20,000.00	1758	3	2	0	5	0	6
TOTAL	323	3	14	0	15	7	17	1	29	7	$1,173,795.43	8208	416	369	11	493	60	542

FLORIDA PUBLIC SERVICE COMMISSION
SUMMARY OF RAILROAD ACCIDENTS FOR Calendar Year, 1955
STATE OF FLORIDA

GRADE CROSSING ACCIDENTS

		NUMBER PEOPLE I	NUMBER PEOPLE K	TYPE OF ACCIDENT VEH. HIT TRAIN DAY	VEH. HIT TRAIN NIGHT	TRAIN HIT VEH. DAY	TRAIN HIT VEH. NIGHT	TOTAL NO. VEHICLES INVOLVED	TOTAL ACCIDENTS	TOTAL I	TOTAL K
Railroad A:	(Cross (X) Buck Signs	47	22	13	4	21	8	46			
	Automatic Signals	18	3	2	2	7	5	16	62	65	25
Railroad B:	(Cross (X) Buck Signs	14	3	3	1	6	0	10			
	Automatic Signals	0	1	1	0	1	1	3	13	14	4
Railroad C:	(Cross (X) Buck Signs	33	8	6	6	10	6	36			
	Automatic Signals	20	13	2	0	13	8	24	60	53	21
Railroad D:	(Cross (X) Buck Signs	2	1	0	1	0	0	1			
	Automatic Signals	0	0	0	0	0	0	0	1	2	1
Railroad E:	(Cross (X) Buck Signs	1	1	1	0	1	1	3			
	Automatic Signals	2	0	2	0	0	0	2	5	5	1
TOTALS		139	52	30	14	68	29	*141	*141	139	52

Number vehicles hit train at night on Cross (X) Buck Sign Crossing.....12
Number vehicles train hit at night on Cross (X) Buck Sign Crossing.....13
Number vehicles hit train day time on Cross (X) Buck Sign Crossing.....23
Number vehicles train hit day time on Cross (X) Buck Sign Crossing.....48
Number vehicles hit train at night on Automatic Signal Crossing..... 3
Number vehicles train hit at night on Automatic Signal Crossing.....10
Number vehicles hit train day time on Automatic Signal Crossing..... 7
Number vehicles train hit day time on Automatic Signal Crossing.....25
Grand Total All Railroad Companies.....*141

OTHER ACCIDENTS

	Employees I	Employees K	Passengers I	Passengers K	Trespassers I	Trespassers K	Non-trespassers I	Non-trespassers K	Derailments	Collisions	Railroad Prop.Loss	Employees Time Loss	Total Accid.	Total I	Total K	Total All Accidents I	Total All Accidents K	Grand Total Accidents
Railroad A:	*116	6	3	0	3	8	6	1	21	2	$101,107.74	2375	166	128	15	193	40	230
Railroad B:	85	0	0	0	2	1	1	0	4	1	58,611.00	861	93	70	0	85	4	89
Railroad C:	62	0	2	0	6	12	16	2	7	3	416,131.26	1666	135	109	14	168	35	193
Railroad D:	0	0	0	0	0	0	0	0	1	1	49,775.00	111	10	6	0	8	1	11
Railroad E:	1	0	0	0	0	1	1	0	2	1	85,110.00	60	6	2	1	7	2	11
TOTALS	251	6	5	0	11	22	24	3	39	10	$711,735.00	5195	374	295	30	436	82	515

*1 employee permanently injured.

FLORIDA PUBLIC SERVICE COMMISSION

SUMMARY OF RAILROAD ACCIDENTS FOR CALENDAR YEAR ENDING 1966
STATE OF FLORIDA

GRADE CROSSING ACCIDENTS

		Number People I	Number People K	Type of Accident Veh. Hit Train Day	Veh. Hit Train Night	Train Hit Veh. Day	Train Hit Veh. Night	Total No. Vehicles Involved	Total Accidents	Total I	Total K
Railroad A:	(Cross (X) Buck Signs	28	14	6	9	16	4	35	46	48	14
	Automatic Signals	20	0	4	10	6	0	11			
Railroad B:	(Cross (X) Buck Signs	10	5	0	2	5	1	8	14	18	5
	Automatic Signals	8	0	0	3	1	2	6			
Railroad C:	(Cross (X) Buck Signs	42	20	8	9	27	2	46	55	59	41
	Automatic Signals	17	21	2	0	6	1	9			
Railroad D:	(Cross (X) Buck Signs	3	2	2	1	0	1	4	6	5	2
	Automatic Signals	2	0	2	0	0	0	2			
Railroad E:	(Cross (X) Buck Sings	5	2	0	1	4	0	5	5	5	2
	Automatic Signals	0	0	0	0	0	0	0			
TOTAL		135	64	24	36	65	11	*126	*126	135	64

Number vehicles hit train at night on Cross (X) Buck Signs Crossing.....22
Number vehicles train hit at night on Cross (X) Buck Signs Crossing.....10
Number vehicles hit train day time on Cross (X) Buck Signs Crossing.....16
Number vehicles train hit day time on Cross (X) Buck Signs Crossing.....52
Number vehicles hit train at night on Automatic Signal Crossing.....4
Number vehicles train hit at night on Automatic Signal Crossing..... 1
Number vehicles hit train day time on Automatic Signal Crossing..... 8
Number vehicles train hit day time on Automatic Signal Crossing.....13
Grand Total all Railroad Companies.....#126

OTHER ACCIDENTS

	Employees I	Employees K	Passengers I	Passengers K	Trespassers I	Trespassers K	Non-Trespassers I	Non-Trespassers K	Derailments	Collisions	Railroad Prop. Loss	Employees Time Loss	Total Accid.	Total I	Total K	Total All Accidents I	Total All Accidents K	Grand Total Accidents
Railroad A:	99	1	2	0	2	5	6	1	36	13	678,107.73	2149	165	109	7	157	17	211
Railroad B:*	37	0	0	0	1	3	0	0	10	2	818,756.00	2060	53	38	3	56	8	67
Railroad C:	63	0	14	0	9	10	10	3	10	3	420,897.52	325	142	116	11	175	52	197
Railroad D:	4	0	0	0	1	1	0	0	0	0	5,000.00	1028	6	5	1	10	3	12
Railroad E:	11	0	11	0	2	3	0	0	5	0	51,846.00	24	32	24	3	29	5	37
TOTALS	234	1	27	0	15	22	16	4	61	18	1,974,607.25	5586	398	292	25	427	85	524

* 1 employee permanently injured Railroad B

FLORIDA PUBLIC SERVICE COMMISSION
SUMMARY OF RAILROAD ACCIDENTS FOR JANUARY, FEBRUARY AND MARCH, 1967
STATE OF FLORIDA

GRADE CROSSING ACCIDENTS

		Number People		Type of Accident Veh. Hit Train		Train Hit Veh.		Total No. Vehicles Involved	Total Accidents	Total	
		I	K	Day	Night	Day	Night			I	K
Railroad A:	(Cross (X) Buck Signs	11	4	0	3	7	0	10			
	Automatic Signals	4	0	2	0	2	0	4	14	15	4
Railroad B:	(Cross (X) Buck Signs	5	0	0	1	1	0	2			
	Automatic Signals	2	0	1	0	1	0	2	4	7	0
Railroad C:	(Cross (X) Buck Signs	7	3	1	3	8	2	14			
	Automatic Signals	0	2	1	0	1	0	2	16	7	5
Railroad D:	(Cross (X) Buck Signs	0	1	0	0	1	0	1			
	Automatic Signals	0	0	0	0	0	0	0	1	0	1
Railroad E:	(Cross (X) Buck Signs	1	1	1	0	1	0	2			
	Automatic Signals	0	0	0	0	0	0	0	2	1	1
TOTAL		30	11	6	7	22	2	*37	*37	30	11

Number vehicles hit train at night on Cross (X) Buck Signs 7
Number vehicles train hit at night on Cross (X) Buck Signs 2
Number vehicles hit train day time on Cross (X) Buck Signs 2
Number vehicles train hit day time on Cross (X) Buck Signs 18
Number vehicles hit train at night on Automatic Signal Crossing 0
Number vehicles train hit at night on Automatic Signal Crossing 0
Number vehicles hit train day time on Automatic Signal Crossing 4
Number vehicles train hit day time on Automatic Signal Crossing 4
Grand Total all Railroad Companies.....*37

OTHER ACCIDENTS

	Employees		Passengers		Trespassers		Non-Trespassers		Derailments	Collisions	Railroad Prop. Loss	Employees Time Loss	Total Accid.	Total		Total All Accidents	Grand Total Accidents
	I	K	I	K	I	K	I	K						I	K		
Railroad A:	24	0	2	0	0	1	5	0	12	0	$108,718.00	538	49	31	1	46	63
Railroad B:	7	0	0	0	0	1	0	0	0	0	- 0 -	482	8	7	1	14	12
Railroad C:	25	0	0	0	4	3	3	0	3	1	22,166.81	500	39	32	3	39	22
Railroad D:	1	0	0	0	0	0	0	0	1	0	- 0 -	25	2	1	0	1	3
Railroad E:	1	0	0	0	0	0	0	0	3	0	276,215.00	7	4	1	0	2	6
TOTALS	58	0	2	0	4	5	8	0	19	1	$407,099.81	1552	102	72	5	102	16	139

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 855

WARREN G. WILLIAMS,
Petitioner,

vs.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 855

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SEABOARD AIR LINE RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

PRELIMINARY

Petitioner, Warren G. Williams, who was Plaintiff in the Trial Court and Appellee-Respondent in the Florida Appellate Court, will be herein referred to as "Williams".

Respondent, Seaboard Air Line Railroad Company, who was Defendant in the Trial Court and Appellant-Petitioner in the Florida Appellate Courts, will be herein referred to as "the Railroad".

The Petition for Certiorari will be herein referred to as "the Petition".

The District Courts of Appeal of Florida (the intermediate appellate Courts), will be referred to as "the District Court".

The correct style of these proceedings, as stated above, should name only the Railroad, as sole Respondent, without the addition of "et al". The latter language was added in Williams' Petition for Certiorari. George Wilbur Eaddy, Engineer of the train involved, was originally a Co-Defendant in the Trial Court, but he was dismissed as such by Williams near the commencement of the trial. (pp. 3-5 of Volume 7 of the Record).

QUESTIONS PRESENTED

We respectfully submit that the questions now presented are as follows, rather than as stated by Williams. (Petition, pp. 2-3).

I.

Does this Court have the jurisdiction to review the judgment of the Florida Supreme Court herein, which was not final, but which remanded the cause to the Trial Court for a new trial?

II.

Should certiorari be granted herein where it appears that the judgment of the Florida Supreme Court was based upon adequate non-federal grounds?

III.

Do the facts in this case present questions of sufficient public importance to invoke the discretionary power of this Court to grant certiorari?

IV.

Were the Federal questions presented in the Petition properly and timely raised in the prior proceedings herein and, should the Petition be denied for failure to comply with Revised Rule 23-1(f) of this Court?

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Federal constitutional provision cited by Williams (Petition, p. 3), the first sentence of Section 12, Declaration of Rights, Florida Constitution is likewise involved:

> "No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation."

STATEMENT OF THE CASE

The Statement of the Case in the Petition (pp. 3-5) is accepted as substantially correct, with the following exceptions.

The statement (p. 5) as to arguments in Williams' brief in the Florida Supreme Court is not supported by the record in these proceedings, and is in effect testimony, manifestly improper at this stage of the case.

The judgment of the Florida Supreme Court not only reversed the District Court, but it also directed that *"the cause be remanded to the trial court for new trial"*. (Emphasis supplied). (Appendix A to the Petition).

Williams did not "again assert the violation of his federally protected rights" in his Petition for Rehearing

to the Florida Supreme Court, as stated in his Petition. (p. 5). In the first place he had not previously asserted them in the record, and could not have *again* asserted them. Further, it appears from said Petition for Rehearing (Appendix A to this Brief) that he only raised a narrow constitutional question as to whether the Railroad was required, from a constitutional standpoint, to seek review from an Interlocutory Order of the District Court denying extraordinary motions. This was obviously a non-federal question. (See Section 3 of the Petition for Rehearing, Appendix A to this Brief).

ARGUMENT

I.

Does This Court Have the Jurisdiction to Review the Judgment of the Florida Supreme Court Herein, Which Was Not Final, but Which Remanded the Cause to the Trial Court for a New Trial?

As demonstrated in the Statement of Facts herein, in the judgment of the Florida Supreme Court sought to be reviewed herein, the Court ordered "that the cause be remanded to the trial court for a new trial".

This fact alone would prevent Williams from invoking the review of that judgment.

It is clear from repeated decisions of this Court that under such action of a State Court, this Court does not have jurisdiction to grant a Petition for Certiorari.

The statutory jurisdiction of this Court to review actions of State Supreme Courts is declared in 28 *U.S.C.; Section 1257:*

> "*Final judgments* or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> (3) By writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * of the United States." (Emphasis supplied).

The effect of the remanding of a case for a new trial is stated in *Annot.*, 89 L. Ed. 1186:

> "A judgment * * * of the highest Court of a State reversing an inferior Court and remanding the case to the lower Court for a new trial * * * is not a final judgment and cannot be reviewed by the Federal Supreme Court."

Nearly a column of citations are given, starting with *Houston* v. *Moore*, 3 Wheat. 433 (1818).

In that early case, in opinion by Chief Justice Marshall, this Court held that it did not have jurisdiction to review a judgment of a State Court which ordered a new trial, because it was not a final judgment, saying:

> "The cause may yet be finally determined in favor of the Plaintiff in the State Court."

To the same effect is *Moore's Commentary on the U. S. Judicial Code*, 568:

> "A judgment of the highest State Court remanding a case for further proceedings, instead of dismissal, is not final even though it disposes of the federal issues."

From the numerous decisions of this Court applying this principle several comparatively recent ones are selected as illustrative.

In *Laclede Gas Light Company* v. *Public Service Commission,* 304 U.S. 398, 58 S. Ct. 988 (1938), the Supreme Court of Missouri had affirmed a judgment and remanded the cause to the Commission for further proceedings regarding determination of proper utility rates. This Court in dismissing the proceedings said:

> "As we are unable to conclude upon the record before us that the State Court has finally disposed of the controversy, the motion to dismiss the appeal must be granted."

In *Gospel Army* v. *City of Los Angeles,* 331 U.S. 543, 67 S. Ct. 1428 (1947), there was an unqualified reversal of lower Court proceedings by the California Supreme Court. Under the law of California, an unqualified reversal is effective to remand the cause "for a new trial and places the parties in the same position as if the case had never been tried."

This Court in dismissing the proceedings said:

> "Under Sec. 237 of the Judicial Code, 28 U.S.C., Sec. 344 (now Sec. 1257) only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' *Department of Banking, State of Nebraska* v. *Pink,* 317 U.S. 264, 63 S. Ct. 233, 235, 87 L. Ed. 254. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

In *Southern Pacific Company* v. *Gileo*, 351 U.S. 493, 76 S. Ct. 952 (1956), dismissed writs of certiorari on the ground that the effect of the lower Court's decision was to remand the case to the trial court, saying:

> "Since the issues of negligence and damages remain to be tried, there is no final judgment in the highest court of the State, and this Court, therefore, lacks jurisdiction to review the Eugrazia and Eelk cases. 28 U.S.C., Sec. 1257, 28 U.S.C.A., Sec. 1257. We therefore dismiss the writs in those two cases."

The requirements of this principle are clearly stated in *Market Street Railway Company* v. *Railroad Commission*, 324 U.S. 548, 65 S. Ct. 770 (1945).

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, Sec. 237, 28 U.S.C., Sec. 344, 28 U.S.C.A. 344 (now Sec. 1257). Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *It must be the final word of a final court.*" (Emphasis supplied).

The reason for the application of this rule in the case at bar is obvious. Under the Florida Supreme Court judgment, the case goes back to the trial court, the Circuit Court of Palm Beach County, Florida for a new trial. At that trial a new jury may well find Williams free of contributory negligence, the Railroad guilty of negligence, and that Williams' damages are more than found by the first jury. Or, even if the Railroad prevailed at trial, the Florida Appellate Courts may well reverse that judgment. Or, there may be a settlement between the parties.

In the language of Chief Justice Marshall in *Houston* v. *Moore*, supra, "The cause may yet be finally determined in favor of the Plaintiff in the State Court".

It is apparent that the case at bar does not meet the test enunciated in the *Market Street* case, supra. It is not "the final word of a final Court".

Therefore, it is respectfully submitted that the pending Petition be denied for lack of finality of the judgment sought to be reviewed.

II.

Should Certiorari Be Granted Herein Where It Appears That the Judgment of the Florida Supreme Court Was Based upon Adequate Non-Federal Grounds?

It is axiomatic that this Court will not review the judgment of a State Court if it is based upon independent and adequate non-federal grounds.

This principle is concisely summarized in *Stern and Gressman, Supreme Court Practice*, 105:

> "The Supreme Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U.S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U.S. 207. 'The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to

> revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.' *Herb* v. *Pitcairn,* 324 U.S. 117, 125-6."

This rule was reiterated by this Court as recently as *Henry* v. *Mississippi,* 379 U.S. 564, 85 S. Ct. 564 (1965), in which the Court said:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, *Murdock* v. *City of Memphis,* 20 Wall. 590, 22 L. Ed. 429, but also in cases involving state procedural grounds. * * * Under the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions."

Examination of the opinion and judgment in the Florida Supreme Court in the case at bar (Appendix A to Petition), demonstrates that the entire decision was not only based on non-federal grounds but that no federal grounds were referred to nor discussed by the Court.

The opinion first holds that the Florida Supreme Court has the power to examine the record to determine whether there is a conflict between the case involved and other decisions of the Court, even though the District Court ruled without opinion. This was obviously a non-federal point. Then the Court reversed the District Court and remanded the cause for a new trial on the authority of two recent opinions on the subject, *Florida East Coast*

Railway Company v. *Rouse*, 194 So. 2d 260 (1967) and *Atlantic Coast Line Railway Company* v. *Braz*, 196 So. 2d 109 (1961).

Referring to these cases, *Rouse* holds that there was a conflict between the judgment of the District Court and the Florida Supreme Court decision in *Georgia Southern & Florida Railway Company* v. *Seven-Up Bottling Company*, 175 So. 2d 39 (1965). (This will be hereinafter referred to, as Williams has in his Petition, as the "Seven-Up case".) This *Seven-Up* opinion appears in the Appendix to the Petition herein, B. The Court further held that, under the circumstances, the point as to conflict could be raised on appeal, although not raised on the trial level; that, accordingly, the judgment of the District Court would be reversed for a new trial. (See Appendix B to this Brief).

In *Braz* the decision was based upon the authority of *Rouse* and reversed the District Court, for a new trial.

Likewise, in ruling on Petition for Rehearing in the case at bar by Williams, the Florida Supreme Court discussed no federal point, but concisely ruled "that said petition be and the same is hereby denied". (See Appendix C to this Brief).

As for the *Seven-Up* case, it clearly rested upon a non-federal ground. Aside from holding that *Section 768.06, Florida Statutes*, the *Comparative Negligence Statute*, was invalid under the Federal Constitution, it *also* held it invalid under *Section 12 of the Declaration of Rights, Florida Constitution*, which has been quoted above under "Constitutional Provisions Involved".

So, even if the ruling as to the effect of the *United States Constitution* on the *Comparative Negligence Stat-*

ute is erroneous, there would still exist an adequate ruling on non-federal grounds—the construction of a provision in the Florida Constitution by the Florida Supreme Court, holding that the Statute violated the Florida Constitution.

Therefore, we submit that in addition to the other grounds in this Brief, the Petition should be dismissed because the judgment involved herein "rests upon independent and adequate state grounds" even though the *Seven-Up* case also decided a federal question.

III.

Do the Facts in This Case Present Questions of Sufficient Public Importance to Invoke the Discretionary Power of This Court to Grant Certiorari?

A consideration in the granting or denying of a certiorari petition by this Court is the importance of the issues involved.

As stated in *Stern and Gressman, Supreme Court Practice,* 136-7:

> "Except where an irreconcilable conflict compels review by the Supreme Court, the importance of the issues involved in the case as to which review is sought is of major significance in determining whether the writ of certiorari will issue. The Court does not have time to give full consideration to all cases which present novel or interesting issues. It must necessarily confine itself to those which reflect the more important legal problems within the realms of its jurisdiction." * * *
>
> "The concept of importance relates, of course, to the importance of the issues 'to the public as distinguished from' importance to the particular 'parties' involved. *Layne* v. *Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393 (43 S. Ct. 422); *Rice*

v. *Sioux City Cemetery*, 349 U.S. 70, 79 (75 S. Ct. 614). Except where a governmental or public body is a litigant and is able to demonstrate an importance in terms of the public interest it represents, an issue the Court deems of interest and importance only to the immediate parties to the case is not likely to qualify as worthy of further consideration."

In the *Layne* case, supra, the Court said:

> "* * * (I)t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head."

And in the *Rice* case, supra, a writ of certiorari which had been granted was dismissed by this Court as improvidently granted, on the authority of *Layne*, supra, the Court quoting the above language.

Applying this principle to the case at bar, it appears that the points involved, although important to the parties, are not important to the public generally.

The *Seven-Up* decision, attacked by Williams, affects only the small number of people in Florida who incur injuries by driving upon the railroad tracks when trains are coming, or who strike trains on the tracks. The statistics in the Appendix to the Petition D, although evidentiary, not a part of the record and improperly presented at this stage of the litigation, do demonstrate the very small number of persons affected by the *Comparative Negligence Statute*, in comparison with Florida's population in excess of six million residents, plus countless millions of visitors. These statistics show only an average

of 127 persons a year for six years involved in grade crossing accidents. From the national standpoint, the issue dwarfs into insignificance in relation to our two hundred million population.

And as for the retroactive effect given to the *Seven-Up* case in the case at bar, only a minute number of persons are affected. This ruling only applies to cases on the subject in which trials occurred before the *Seven-Up* decision in May, 1965, now nearly three years old, and which are still pending. It is apparent by this time very few of these remain. Except as to these, the issues on this point are moot from the standpoint of public interest.

Rule 19, Revised Rules of this Court, provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where they are *special and important* reasons therefor." (Emphasis supplied).

No "special and important" reasons appear. The Petition is merely "a last ditch effort" of Williams to preserve the judgment he obtained. Admittedly, this issue is important to him, as well as to the Railroad, but not to the public generally.

For this purpose, Williams seeks to divert the attention of this Court from urgent international and national issues, and questions of impelling public importance, to consider his judgment, reversed for a new trial, at which he may still prevail.

Therefore, we submit that the Petition fails to show grounds warranting the discretionary action of this Court in granting certiorari.

IV.

Were the Federal Questions Presented in the Petition Properly and Timely Raised in the Prior Proceedings Herein and, Should the Petition Be Denied for Failure to Comply with Revised Rule 23-1(f) of This Court?

Another fundamental prerequisite for the granting of certiorari from a State Court judgment is that the Federal question shall have been properly raised in the State Court proceedings.

As stated in *Stern and Gressman, Supreme Court Practice*, 90:

> "It is essential to the jurisdiction of the Supreme Court under *Section 1257* that a substantial federal question have been properly raised in the State Court proceedings."

Illustrative of this principle is *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 65 S. Ct. 624 (1945), in which this Court said:

> "It is essential to our jurisdiction on appeal under *Section 237(a)* (now *Section 1257* that there be an explicit and timely insistence in the State Courts that a State statute as applied is repugnant to the Federal Constitution, treaties or laws."

Of course, the same rule applies in this connection in certiorari as on appeal. A number of decisions of this Court on such point are cited in support of the above quotation.

This Court has emphasized this principle in *Rule 23, Revised Rules of the Supreme Court of the United States*:

> "1. The petition for writ of certiorari shall contain in the order here indicated—* * *

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Williams has not complied with this Rule in his Petition. The apparent reason is that he could not do so, because the Federal questions sought to be reviewed herein were not raised in the record by him at any stage in this litigation.

The only Federal question raised by Williams was in his Petition for Rehearing in the Florida Supreme Court (Appendix A to this Brief), which was denied without opinion. That question related to whether the Railroad should have sought review of an interlocutory order of the District Court on extraordinary motions filed by it. This was obviously a non-federal ground. The Florida Supreme Court could certainly determine as a matter of State law whether the order in question was interlocutory or final, and if interlocutory, to sustain the right of review from the final action of the District Court. It is to be noted that in its opinion the Supreme Court did not

consider this point of sufficient importance to comment upon it. (Appendix A to the Petition).

No other Federal question was raised of record by Williams, and none were mentioned in the opinion of the Florida Supreme Court herein.

In the certiorari petition, it is said that the Federal questions were raised in Williams' Brief in the Florida Supreme Court. Nothing in the record filed in this Court supports this "testimony".

Further, this Court has repeatedly held that the raising of Federal questions in briefs is not sufficient to comply with the requirement that such questions be properly raised in the State Court, in order to vest jurisdiction in this Court.

In *Zadig* v. *Baldwin*, 166 U.S. 485, 17 S. Ct. 639 (1897), this Court said, with citation of a number of opinions of this Court supporting this statement:

> "The contention that there was a federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this Court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a federal question is discussed; and it is asserted orally at bar that in the oral argument made in the supreme court of California a claim under the federal constitution was presented. But manifestly, the matters referred to form no part of the record, and are not adequate to create a federal question when no such question was necessarily decided below; and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state."

In *Live Oak Water Users' Association* v. *Railroad Commission*, 269 U.S. 354, 46 S. Ct. 149 (1925), the above statement in *Zadig* was quoted and followed.

In *Lynch* v. *People of New York*, 293 U.S. 52, 55 S. Ct. 16 (1934), in holding that the record failed to show jurisdiction in this Court and dismissing the writ of certiorari, this Court said:

> "But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not a part of the record."

Therefore, in addition to the other grounds herein detailed, it is submitted that the failure of Williams to comply with *Rule 23-1(f)* of this Court and properly to raise the Federal questions asserted in his Petition is fatal. It is respectfully submitted that such Petition be denied.

CONCLUSION

Summarizing our argument, Williams is not entitled to a Writ of Certiorari herein because:

1. The judgment herein sought to be reviewed is not a final judgment, in that the cause was remanded for a new trial.

2. Said judgment is based upon adequate non-federal grounds.

3. The Petition does not present questions of public importance.

4. The Federal questions sought to be invoked herein were not properly and timely raised below; and Williams has not complied with Rule 23-1(f) on this point.

Accordingly, it is urged that the Petition for a Writ of Certiorari to the Supreme Court of Florida be denied.

Respectfully submitted,

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January, 1968.

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

No. 35,718

SEABOARD AIR LINE RAILROAD COMPANY, a foreign corporation, authorized to do business in the State of Florida,
Petitioner,

vs.

WARREN G. WILLIAMS, JR.,
Respondent.

Petition for Rehearing

Respondent, WARREN G. WILLIAMS, JR., by his undersigned attorneys, respectfully petitions the Court for a rehearing on the petition for Writ of Certiorari and submits that the opinion of the Court filed May 24, 1967, quashing the decision of the District Court with directions that the cause be remanded to the Trial Court for a new trial, should be held for naught for the following reasons severally:

I.

The Court filed its opinion on May 24, 1967, without due consideration and deliberation given to the Respondent's brief filed with the Court and to the oral argument presented by counsel for the Respondent and failed to consider the matters and things set forth in said brief and authorities quoted therein.

II.

The Court overlooked Point I of the Respondent as set forth in his brief and made no reference whatsoever to said point in the opinion filed by this Court on May 24, 1967.

III.

In this Court's majority opinion sub judice it was stated, "it is obvious for all to see, that the rule of law applicable at the time of appellate decision will have applied to the two cases while a different erroneus rule will have been applied in a third". Such reasoning compounds error upon error, as say, two "rear-end" decisions decided one way requires that a third also be decided the same although the third was guilty of a gross violation of procedure and constitutional jurisdiction. Petitioner sought jurisdiction of this Court on the basis of grave and fundamental error not apparent or available to preserve at trial. Petitioner attempted to invoke jurisdiction of the Second District Court of Appeal on this identical basis in July, 1965, and said Court rightfully denied same by its order of July 7, 1965. If Petitioner were entitled to a further review by any stretch of imagination in this Court, it should have timely filed its petition for writ of certiorari, i.e., within sixty (60) days of July 7, 1965. This was not done and obviously now it is too late. The District Court being a Court of final determination by our constitution, Respondent's rights were vested at that time. *To further review this action by the Second District Court of Appeal is a denial of Respondent's rights as guaranteed by the due process and equal protection clauses of the United States Constitution* and Section 12, Declaration of Rights of the Florida Constitution. (Emphasis supplied).

IV

It was distinctly stated in Point I that the Petitioner while the case was in the Second District Court by motions attempted to have the Court permit it to amend its assignment of errors and its brief so as to bring forward the constitutionality of the comparative negligence stat-

ute based upon the fundamental error conception. The District Court refused to permit these amendments and by its order of July 7, 1965, denied said motions. Notwithstanding action of the Second District Court which was the Court of final determination on this question, the Petitioner proceeded to argue the case on its merits on appeal before the Fourth District Court and did not see fit to timely bring up by Certiorari to this Court the order overruling its petitions to amend. The Petitioner, by refusing to take the order of the Second District Court of Appeal in proper time to this Court by writ of certiorari, was estopped from again asserting this question before this Honorable Court. The Petitioner had had his day in Court and cannot again have a second day in Court or two swings at the ball, all of which is contrary to the Florida Appellate Rules which were promulgated by this Court.

V.

By the opinion followed by this Court on May 24, 1967, it is in effect placing in doubt the Constitutional Amendment, to-wit: Article V, Sec. 5(3), giving and granting to the District Courts of Appeal final jurisdiction to review cases from trial Courts of each appellate district, and thus holding Article V, Sec. 5(3), for naught.

VI.

The Court overlooked the jurisdiction and authority given to the District Courts of Appeal by Article V, Sec. 5(3) of the Constitution of the State of Florida and in effect thus granting to this Court the right to search the record of any appeal before it to see if error has been committed.

VII.

The Court failed properly to evaluate and give the effect of "per curiam affirmed". For aught this Court knows, "the per curiam opinion affirmed", the Fourth District Court of Appeal took into consideration the record as presented to it. No duty or authority is given this Court to go behind this per curiam affirmed, and search the record in effort to find some error, if any. If this Court has authority to act as set forth in its opinion of May 24, 1967, it is useless and of no benefit for the District Court of Appeal to exist.

VIII.

The Court failed by its opinion in this cause to give any weight or value to the opinions of the District Court of Appeal and in fact gave the Petitioner in this cause two swings at the ball, having been denied the right to bring forward the question of comparative negligence in the District Court of Appeal. This Court searched the record to find some reason so that the Petitioner may have two appeals, all of which is contrary to the Constitution of the State of Florida which has granted unto the District Court of Appeal to be a Court of final jurisdiction. This Court violated the authority given it by the Constitution when it attempted to clothe itself with the authority and privilege of exploring trial records in order to produce a conflict when the record discloses that no conflict exists.

IX.

The Court failed to evaluate this case in accordance with the power granted it by the Constitution of the State of Florida and by so doing held that the District Court of Appeal decisions are no longer final under any circum-

stances and throws appellate decisions into a turmoil and strife.

X.

This Court failed to stay within the bounds of the Constitution of the State of Florida, thus causing all litigants to be apprehensive of any decision of the District Court of Appeal and causing the litigant to never be satisfied until an attempt is made to have this Court review the decision of the District Court of Appeal in all instances.

Respondent respectfully prays that this Court enter its order granting this Petition for Rehearing.

Respectfully submitted,

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APPENDIX B

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1966

FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation,
Petitioner,
vs.
RUBY ROUSE,
Respondent.

Case No. 34,815

Opinion filed January 9, 1967.

Writ of Certiorari to the District Court of Appeal, Third District.

Bolles, Goodwin & Ryskamp, for Petitioner.

Nichols, Gaither, Beckham, Colson & Spence and Horton & Schwartz, for Respondent.

On Petition for Rehearing Granted

CALDWELL, J.

Showing conflict jurisdiction, the petitioner for writ of certiorari seeks review of the decision of the District Court of Appeal, Third District, reported at 178 So. 2d 882, affirming a jury verdict and judgment of Sixteen thousand three hundred thirty-three dollars ($16,333.00) for respondent Ruby Rouse, plaintiff in the trial court, against the petitioner-defendant, Florida East Coast Railway Company. The respondent, while walking on the railway tracks, was injured by petitioner's train.

At the trial both parties requested instructions under the railroad comparative negligence statute[1] and the instruction requested by petitioner was given. On appeal, the petitioner assigned as error the trial court's refusal to grant its motion for directed verdict.

After entry of final judgment for the plaintiff, but prior to the date set for argument on appeal in the District Court, this Court rendered its decision in Georgia Southern and Florida Railroad Company v. Seven-Up Bottling Company, 176 So. 2d 39, holding Florida Statute §768.06, the railroad comparative negligence statute, unconstitutional. In other words, the cause sub judice was tried under the law of Florida as it was prior to the decision last above cited and the appeal in the District Court was considered after that decision was rendered.

The District Court of Appeal held the instruction on comparative negligence, given pursuant to the pertinent statute (subsequently held invalid) did not constitute fundamental error which could be raised for the first time on appeal.

Although not applied because the appellate court thought the point, not raised at the trial level, could not be considered on appeal, the District Court correctly stated the controlling rule of law in this language:

> "We recognize the general and Florida rule to be that an appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition, and not according to the law prevailing at the time of rendition of the judgment appealed."

---

1. F.S. §763.06.

A change in the state of the law, intervening between trial and appeal, seldom occurs and is usually not foreseeable. The change in this cause was not foreseeable, the comparative negligence statute having been held valid in 1942.[2] Nevertheless, and notwithstanding the failure of the parties, at the trial level, to attack the validity of the statute, the appellate court was required to apply the law as it existed at the time of appeal.

A somewhat similar situation[3] arose in 1934, and this court held:

> "In order that the present case may be reconsidered in the court below in the light of the rule of law stated in the above-mentioned cases decided here subsequent to the entry of the present appeal in this case, it is ordered that the decree appealed from be reversed without prejudice, and that this cause be remanded to the circuit court for further proceedings therein, with leave to each of the parties to make such amendments to the pleadings and to offer such additional evidence as the Chancellor may allow in order to have the controversy properly re-presented to the court for reconsideration in the light of applicable provisions of law. . . ."

In a cause[4] involving a statutory change between the trial and appeal it was held:

> "It is apparent that Section 687.07, Florida Statutes, 1963, F.S.A., was the basis of the proceedings below. However, subsequent to the entry of the final decree and the filing of the notice of appeal, Chapter 650299, Laws of Florida 1965, was enacted, the provisions of which may have some effect on Section

2. Loftin v. Crowley's, Inc., 150 Fla. 836, 8 So. 2d 909 (1942).

3. Winter Park Golf Estates v. City of Winter Park, 114 Fla. 350, 153 So. 842 (1934).

4. General Capital Corporation v. Tel Service Co., 183 So. 2d 1 (Fla. 1966).

687.07. The appellant has filed a motion here for application of the intervening legislation, and the appellee has filed a suggestion of the unconstitutionality of intervening legislation, plus a motion for an order suspending appellate proceedings, and remanded the cause to the trial court for consideration of its suggestion of unconstitutionality. Since we have a law of the state of Florida which intervenes subsequent to the law on which this case was originally decided, we temporarily relinquish jurisdiction over this case and remand it to the lower court for reconsideration and redetermination of the issues that may arise in view of the 1965 Act. * * *"

In this cause, between trial judgment and appeal, there was a change in law which affected the result and, in consequence, certiorari must be granted, the decision under review quashed without prejudice and the cause remanded with directions to remand for a new trial.

It is so ordered.

THORNAL, C.J., THOMAS, ROBERTS and O'CONNELL, JJ., concur.

DREW, J., dissents with Opinion.

ERVIN, J., dissents and concurs with DREW, J.

DREW, J., dissenting:

On rehearing I would adhere to the order discharging the writ issued in this cause.

There appears to be no genuine dispute on the point of applicability of current decisional law to the disposition of all issues properly presented on an appeal.[1] On the record in this case, however, the district court concluded that the appellant could not present initially on

1. Winter Park Golf Estates v. City of Winter Park, 114 Fla. 350, 153 So. 842 (1934).

appeal an issue inconsistent with the theory on which it defended the suit and requested instructions to the jury in the trial court, and wholly beyond the scope of the appeal controverting the judgment only on the ground that a verdict should have been directed.

The decision further was that the error, if any, was invited error and the requested instructions, stating the statutory exclusion of the defense of contributory negligence which was not raised by the pleadings in any event, did not constitute fundamental error requiring reversal of the judgment of a trial court before which the issue was not raised. This decision does not, in my opinion, conflict with the decisions[2] cited by petitioner holding that questions of statutory validity in other factual situations amount to fundamental error which may be urged at any time.

I think it is apparent from an examination of the alleged conflicting decisions, in conjunction with the mass of related rulings in this area,[3] that the cases in question held only that the constitutional issues there presented involved fundamental error, and not that constitutional issues, generally, amount to fundamental error cognizable initially on appeal. The latter contention is clearly irreconcilable with the elemental rule of judicial procedure requiring that constitutional issues be eschewed unless timely raised and essential to the disposition of a cause.[4]

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2. Parker v. Town of Callahan, 115 Fla. 266, 156 So. 334; Town of Monticello v. Finlayson, 156 Fla. 568, 23 So. 2d 843.

3. Ellis v. State, 74 Fla. 215, 76 So. 698; Carlton v. Fidelity and Deposit Co., 113 Fla. 63, 154 So. 317; Evans v. Hillsborough County, 135 Fla. 471, 186 So. 193; Mills v. Mills, 153 Fla. 746, 15 So. 2d 763; Henderson v. Antonacci, Fla. 1952, 62 So. 2d 5; Greene v. Alexander Film Co., Fla. 1953, 65 So. 2d 53; State v. McInnes, Fla. App. 1961, 133 So. 2d 581; Gleason v. Dade County, Fla. App. 1965, 174 So. 2d 466; cf. 6 Fla. Jur., Constitutional Law, §50, p. 310, n. 14.

4. Greene v. Alexander Film Co., (1953 Fla.) 65 So. 2d 53; 1 Fla. L. Rev. 460.

Neither does such a contention comport with the decisional definition of fundamental error in civil cases as relating to the existence of the cause of action, right to recover, or jurisdiction of the trial court,[5] non-waivable in this and other contexts.

Although the point is not essential to my conclusion on the petition in this case, it seems to me that the decision of this Court in Georgia Southern & Fla. R. Co. v. Seven-Up Bottling Co., Fla. 1965, 175 So. 2d 39, was only to the effect that factual conditions had at the time of that decision rendered Section 768.06, F.S., unconstitutional. Whatever might be the implications with respect to contemporaneous litigation involving the statute, the decision certainly did not purport to adjudicate its validity at any earlier time, as is the case when constitutionality turns upon issues necessarily invalidating a law ab initio. Nor did the court in that case conclude that any earlier adjudication of constitutionality of the statute was in error on the facts then presented. Some distinction must of course be made between retroactive application of case law as opposed to legislative enactments,[6] since the controlling effect of a judicial decision beyond the specific parties involved depends in our system of jurisprudence upon the principles of stare decisis rather than any pronouncement of the court.

I would, for the reasons hereinabove stated, adhere to the order of discharge.

ERVIN, J., concurs.

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5. Townsend v. Beck, 140 Fla. 553, 192 So. 390. Cf. Schaff v. Lynn, Tex. Civ. App. 1923, 253 S. W. 590, 591.

6. General Capital Corporation v. Tel Service Co., 183 So. 2d 1 (Fla. 1966).

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
FRIDAY, JUNE 30, 1967

SEABOARD AIR LINE RAILROAD COMPANY, a foreign corporation, authorized to do business in the State of Florida,
Petitioner,
vs.
WARREN G. WILLIAMS, JR.,
Respondent.

Case No. 35,718

The order of this court dated Wednesday, June 28, 1967, denying petition for rehearing is vacated and the following order is substituted in lieu thereof:

Upon consideration of petition for rehearing filed by respondent,

IT IS ORDERED that the petition be and the same is hereby denied.

A True Copy
TEST:
/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

CC: Messrs. Farish & Farish
Messrs. Caldwell, Pacetti & Barrow
Hon. Chas. S. Ausley
Hon. Julia Maddox
Hon. John B. Dunkle

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 855

WARREN G. WILLIAMS, JR., *Petitioner,*

v

SEABOARD AIR LINE RAILROAD COMPANY, *Respondent.*

REPLY BRIEF FOR PETITIONER

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Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 855

WARREN G. WILLIAMS, JR., *Petitioner,*

v

SEABOARD AIR LINE RAILROAD COMPANY, *Respondent.*

REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition to Petitioner's application for writ of certiorari rather than meeting the important substantive issues raised by the Petitioner has devoted itself to a recitation of formalistic technical objections which upon close examination have little, if any, merit. The Respondent raises four arguments which can be summarized as follows:

First, the Petitioner did not properly and timely raise any Federal question in the court below and therefore has not complied with Rule 23-1(f) of the Court's Rules.

Second, closely related to that argument is the Respondent's contention that the judgment of the Supreme Court of Florida is based upon adequate non-federal grounds. Respondent states "the entire decision was not only based on non-federal grounds but no federal grounds were referred to nor discussed by the court." (Brief in Opp. at 9).

Third, the judgment sought to be reviewed is not final in that the Supreme Court of Florida merely reversed and remanded for new trial.

Fourth, the case presented to the Supreme Court for determination raises no questions of public importance.

The Petitioner will answer these arguments in the order set forth above.

I

Respondent in its brief in opposition takes issue with the Petitioner's Statement of the Case. Specifically, Respondent asserts that no constitutional issue was raised in the Supreme Court of Florida and that only in his Petition for Rehearing did the Petitioner raise a constitutional question. Respondent even felt it essential to have the Petition for Rehearing reproduced in its Appendix. (See Brief in Opp. pp. 4-5). Yet, this exception raised by the Respondent disregards the fact that at his first opportunity the Petitioner in his brief[1] to the Supreme Court of Florida raised clearly and precisely the constitutional issue of retroactive application of a recent decision which was implicit in the court's action, citing the applicable provisions of

[1] This brief was filed in March 1965 over two months prior to the Petition for Rehearing upon which the Respondent places so much emphasis.

the United States Constitution and numerous United States Supreme Court decisions. The Petitioner stated

> To allow the Defendant at this time to come in and re-argue the issue of the constitutionality of the Comparative Negligence Statute and its applicability to the case sub judice is, in effect, a denial of Plaintiff's rights as guaranteed by the due process and equal protection clauses of the Federal Constitution[2] and Section 12, Declaration of Rights, Florida Constitution. (Brief of Respondent at page 9).

The relevant portion of Petitioner's brief before the Florida Supreme Court is reproduced as Appendix A.

The Respondent further compounds its error by asserting that the issue was not timely or properly raised. This contention highlights the formalistic and incomplete nature of the Respondent's approach to the case. Examination of the very cases relied upon by the Respondent shows clearly that while it is perhaps unusual, a federal question may be properly and timely raised in a brief or argument in the court below. The Respondent cites *Live Oak Water Users' Asso-*

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[2] The Respondent railroad when it attempted to amend is assignment of errors in the appellate court to challenge the constitutionallity of the Florida statute and to take advantage of the recent *Seven-Up* case was itself injecting the federal constitutional issue of due process and equal protection upon which that decision rested.

It is important to note that the *Seven-Up* case was decided upon a federal ground, "that it is, therefore, invalid under the due process and equal protection clauses of the federal constitution and Section 12, Declaration of Rights, Florida Constitution. (See Petition for Cert. A 8, A 12). The Petitioner here challenges the *Seven Up* decision as contrary to the Federal Constitution and this Court's decisions. Clearly, as will be developed, infra at p. 8, the number of accidents and the need for protection represents a reasonable legislative classification which can not be overturned by passing references to the constitution of the United States. See Petition for Cert. at p. 9.

ciation v. *Railroad Commission,* 269 U.S. 354 (1925), for support. The Supreme Court in that case said:

> A claim merely presented to the Commission upon rehearing would not suffice to give us jurisdiction. *It must have been definitely brought to the court's attention.* [Petitioner's brief accomplished this purpose.] Although a copy of the request for rehearing addressed to the commission is annexed to the petition to the Supreme Court, *this petition made no claim under the Federal Constitution with sufficient definiteness for us to say the court's attention was challenged thereto.* Neither opinion shows that it considered or necessarily passed upon any such question. *Id.* at 357. (Emphasis added.)

Clearly the Petitioner in the case at bar brought the matter to the attention of the Florida Supreme Court and in his brief to the court focused with extreme care on the important constitutional questions involved. This was the first opportunity and the first place that the Petitioner could raise the question of deprivation of his constitutional rights. Indeed, it was the action of the Supreme Court of Florida in granting review and its later decision which is in issue. Cf. *Whitney* v. *California,* 274 U.S. 356, 362-363 (1926).

Even assuming arguendo that constitutional issues were first raised in the Petition for Rehearing, this Court has held that a federal issue is properly and timely raised in a petition for rehearing. See *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444 (1923); *Fleming* v. *Fleming,* 264 U.S. 29 (1924). Accordingly, Petitioner submits that the federal question was timely and properly raised in the court below.

II

Respondent also asserts that the case was decided on adequate non-federal grounds. Respondent has coupled this argument with the preceding one, that is, because there was no federal question timely raised the Supreme Court of Florida in deciding the case, did so upon adequate non-federal grounds. In Respondent's view this is clear, because the court did not even refer to any federal grounds. (See Brief in Opp. at p. 9). This argument can hardly be accepted when it is realized that the Petitioner challenged the Supreme Court of Florida to answer the question whether it would be a violation of his constitutionally protected rights to give retroactive effect to the recent *Seven-Up* decision (*Georgia Southern & Florida Railway Co.* v. *Seven-Up Bottling Co.*, 175 So.2d 39)[3] which was issued after his trial. Yet, the Supreme Court of Florida chose to ignore completely this vital question.

Certainly when the question of federally protected rights is involved, a court cannot simply ignore the question, unless of course, the issue is so well settled that the question is frivolous. For example, in *habeas corpus* proceedings and motions under 28 U.S.C. 2255 where constitutional issues are raised there has to be a hearing on the merits. *Grundler* v. *State of North Carolina*, 283 F.2d 798 (4th Cir. 1960); *United States* v. *La Vallee*, 279 F.2d 396 (2d Cir. 1960). If this

[3] It is interesting to note in this case that the personal injury aspect of the case was settled and the Plaintiff compensates for his injury. On a stipulated set of facts the Supreme Court of Florida declared unconstitutional the Florida comparative negligence statute as contrary to the equal protection and due process clauses of the Federal Constitution thus taking away Plaintiff's right under the statute *in personal injury cases.*

were the case, any challenge to state action could be mooted by the state court ignoring the federal question and deciding the matter on non-federal grounds. Certainly, a court cannot act in such a manner as to violate the fundamental concepts of due process. (See Petition for Cert. at p. 14).

III

The judgment sought to be reviewed *is a final order* which deprives the Petitioner of a federally protected right. The Respondent makes much of the fact that the order of the Supreme Court of Florida stated that the case is reversed and remanded for new trial. To be a final order does not necessarily mean the last possible order to be made in a case. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964).

Quoting Justice Black in *Gillespia, supra,* "the requirement of finality be given a practical rather than technical construction. . . . [I]n deciding the question of finality the most important competing considerations are the inconvenience and cost of piecemeal review on the one hand and the danger of *denying justice on the other.*" *Id.* at 152-153. (Emphasis added.)

If the Petitioner's case were returned to the trial court he would be effectively denied the right to raise the doctrine of comparative negligence and would be subject to the absolute defense that he was contributionally negligent. Indeed the doctrine of comparative negligence under which the first trial was conducted tacitly recognizes that there was some evidence of negligence on the part of the plaintiff since he was on the tracks. Accordingly the Petitioner would be

effectively barred from any recovery and would be irreparably injured.[4]

The Respondent relies on *Gospel Army* v. *City of Los Angeles,* 331 U.S. 543 (1947) to sustain its position. Yet even in that case this Court looked to whole record in determining the question of finality and the Petitioner asks the Court to do likewise in this case. In *Local No. 438* v. *Curry,* 371 U.S. 542 (1963), Mr. Justice White speaking for the Court, after careful examination of the entire record, rejected the contention that the order of the Georgia court overruling a demurrer was not a final judgment and said:

> The Georgia court's denial of this federal claim was held reviewable here although ordinarily the overruling of a demurrer is not a final judgment. . . . and concluded that for all *practical purposes* the litigation in the Georgia courts was terminated, since the *employee freely conceded he had no further defenses to offer in the state courts, ... Id.* at 551. (Emphasis added.)[5]

The Petitioner submits that the Florida Supreme Court having determined that the Comparative Negligence Statute is unconstitutional and having applied that determination retroactively, he is immediately and finally foreclosed from further meaningful litigation. Accordingly, the effect of the Supreme Court of Florida's decision is the death knell of the action and review should be allowed. *Cf. Eisen* v. *Carlisle & Jacquelin,* 370 F.2d 119 (2d Cir. 1966); See also

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[4] The legal doctrine of comparative negligence is the complete antithesis of the doctrine of contributory negligence. The former assuming the existence of negligence on the part of the plaintiff would still permit recovery.

[5] Cf. *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555 (1963).

Chabot v. *National Securities and Research Corp.*, 290 F.2d 657, 659 (2d Cir. 1961).

IV

The Respondent alleges that the Petitioner has not presented any important question for the Court's consideration, after all "only an average 127 people a year for six years [are] involved in grade crossing accidents in Florida."[6] This, without attempting to assess the value to be placed upon a human life, injury or suffering, would appear to be an appreciable number. (Brief in Opp. at p. 13.) This case presents not merely the problem of train accidents in Florida, and the loss of life and property in that state, see Appendices D 1-D 6 of Petition for Cert., but the loss of life and property in other states which have similar comparative negligence statutes. (See fn. 7 Petition for Cert. at p. 9). The decision of the Florida court which is here challenged affects all future actions and prospective plaintiffs who have been injured by a Florida railroad. This case raises not only the practical issue of the protection of human lives but the unresolved legal issue of what are the minimal constitutional standards for due process in state court proceedings.[7] Further, the Supreme Court of Florida has acted in a manner prohibited by the Constitution[8] in striking

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[6] This assumes that Respondent's figure is accurate. In fact, as disclosed by Appendix D1-D5 the number of people killed and injured ranges from a low of 169 in 1963 to a high of 199 in 1966.

[7] See *Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537 and Petition for Cert. at page 5.

[8] Compare *Hillock* v. *Heilman*, 201 So.2d 544 (Sup.Ct.Fla. 1967) in which the same Supreme Court refused to strike down a guest motorist statute asserting that any relief must come from the legislature.

down a valid legislative enactment and further in giving its determination retroactive effect to case already decided. *Cf. Forbes Pioneer Boat Line* v. *Bd. of Commissioners of Everglades Drainage District,* 258 U.S. 338 (1922). Judicial action of this sort affects not only this petitioner but the public generally.

CONCLUSION

For the reasons stated above, the Petitioner believes that it has raised important questions for this Court's determination in a proper and timely fashion and that he seeks relief from a final order of the Supreme Court of Florida. The Petitioner therefore requests that the Petition for Writ of Certiorari filed on November 24, 1967 be granted.

Respectfully submitted,

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APPENDIX A

No. 35,718

IN THE

SUPREME COURT OF FLORIDA

SEABOARD AIR LINE RAILROAD COMPANY, etc., *Petitioner,*

v.

WARREN G. WILLIAMS, JR., *Respondent.*

On Petition for a Writ of Certiorari to the
District Court of Appeal,
Fourth District

BRIEF OF RESPONDENT

* * * * * * * * * *

[–8–]

It is apparent that the decision of the District Court of Appeal for the Fourth District, does not conflict with any other case or cases which have appeared either in the District Courts of Appeal or in the Supreme Court. It can unequivocably be stated that the decision of the Fourth District in the case sub judice does not in any way conflict with those decisions in *Braz* and *Rouse,* as to the Railroad Comparative Negligence Statute, because the law of the *Seven-Up* case was clearly not applicable.

[–9–]

To allow the Defendant at this time to come in and re-argue the issue of the constitutionality of the Comparative Negligence Statute and its applicability to the case *sub judice is, in effect, a denial of Plaintiff's rights as guaranteed by the due process and equal protection clauses of the Federal Constitution and Section 12, Declaration of Rights, Florida Constitution.* The United States Supreme Court in an unbroken line of cases starting with the *United States* v. *Schooner Peggy,* 5 U.S. 103, 1 Cranch. 103, 2 L.

Ed. 49, to the latest case, *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, has recognized the principle that when a judgment has been finalized, and is not on direct review, any subsequent court decisions should not be given retroactive effect to this particular class of cases. See 14 L. Ed. 2d 992 et seq.

Chief Justice Hughes in *Chicot Co. Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 84 L. Ed. 329, commented on a prior interpretation as to the *retroactive effect of an unconstitutional* law, stating:

> "It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The task cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to the invalidity may have to be considered in various aspects.—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claim have been vested, of status, of prior determination
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> [–10–]
>
> deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." 308 U.S. at 374. (Emphasis supplied)

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